Petition

81-1326

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NO. _____

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1981

THOMAS R. BARONI, ET AL. PETITIONERS

v.

UNITED STATES RESPONDENT

ON WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit erred in holding that the "misrepresentation" exclusion of the Federal Tort Claims Act mandates dismissal of a suit for the general tort of negligent creation of a danger by breach of duty voluntarily assumed. The holding below is contrary to Neal v. Bergland, 646 F.2d 1178, 1181-1182 (6th. Cir. 1981) and Ingham v. Eastern Airlines, Inc., 373 F.2d 227, 236 (2d. Cir. 1967), which rejected the misrepresentation exclusion as a defense to suits which, like this one, were grounded not on misrepresentation but on the negligent performance of a duty voluntarily assumed. See Restatement of Torts 2d §§323, 324A.

2. Whether the Court of Appeals for the Fifth Circuit has acted contrary

to United States v. Neustadt, 366 U.S. 696, 6 L.Ed. 2d 614 (1961), and drastically undermined the protection afforded injured citizens under the Federal Tort Claims Act, by ignoring the common law limits of the tort of misrepresentation and by applying the misrepresentation exclusion to plaintiffs to whom the United States made no representation, who were ignorant of the danger the United States created, and who have no remedy for misrepresentation but do have a cause of action for negligent creation of a danger.

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The "misrepresentation" exclusion of the Federal Tort Claims Act does not bar a suit for negligent creation of a danger when the plaintiff relies on the Good Samaritan tort doctrine under Restatement of Torts 2d §§323, 324A, which the common law distinguishes from misrepresentation, particularly when plaintiff has pleaded facts inconsistent with misrepresentation 8

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Citations to Proceedings Below

The opinion of the district court is unreported but is attached as Appendix A to this Petition. The opinion of the Court of Appeals is reported at 662 F.2d 287 and is attached as Appendix B to this Petition.

Grounds for Jurisdiction

The jurisdiction of this Court to review the case on Petition for Certiorari rests upon 28 U.S.C. §1254(1). This Petition seeks review of a decision of the United States Court of Appeals for the Fifth Circuit dated October 15, 1981.

Statutes

28 U.S.C. §1346 (b):

> (b) [T]he district courts, . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act of omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2680(h);

> The provisions of this chapter and section 1346(b) of this title shall not apply to--
>
> (h) Any claim arising out of . . . misrepresentation . . . .

STATEMENT OF THE CASE

Petitioners Thomas R. Baroni, et al.* are 61 homeowners in the Hamilton Heights Subdivision, Vicksburg, Mississippi. The subdivision was developed to meet the housing needs of individuals who could not afford to own a home unless they had financing from the Veterans Administration or the Federal Housing Administration. Acting pursuant to §203 of the National Housing Act of 1934, as amended, 12 U.S.C. §1709, Mr. James C. Hamilton, Jr., the

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*Pursuant to Supreme Court Rule 21.1(b), petitioners state that, in addition to the captioned parties, the following persons are parties in this case: Jon E. Baroni, Bobby E. Rippy, Delores A. Rippy, Hugh E. Wilkinson, Jr., Frankie N. Wilkinson, Ruby E. Abney, Hugh A. Acuff, Jr., Patricia L. Acuff, James E. Bagby, II, Linda L. Bagby, Robert H. Barlow, Andre M. Barlow, Terry L. Boell, Patricia Logue Boell, Elton Ray Brown, Shirley M. Brown, H. B. Butler, Mildred E. Butler, Walter T. Cosby, Ellen T. Cosby, David K. Daniels, Alice Faye Daniels, Billy F. Duncan,

developer, submitted his plans to the Federal Housing Administration which is now a part of the U.S. Department of Housing and Urban Development (HUD). His application put HUD on notice of potential flooding. HUD employees then performed a survey of the property and determined that most of the lots were higher than a 50-year frequency flood. HUD required Mr. Hamilton to fill in the rest of the lots so as to bring them up to the elevation HUD established as the 50-year flood elevation, which was necessary for federal financing. See FHA Underwriting Manual ¶¶ 70437.3 "Flooding", 70437.4 "Frequency."

Floy W. Duncan, Lamar Eakes, Betty Eakes, Johnny Gray, Geraldine Gray, W. T. Griffing, Effie Lee Griffing, Robert Lynn Hall, Emily Jeanine Hall, C. M. Hammond, Paul M. Hilliard, Joyce Marie Hilliard, J. P. Hoff, Robert S. Holcomb, Melanie S. Holcomb, John Hollenbeck, Margaret Ann Hollenbeck, H. L. Hortsmann, Helen V. Hortsmann, Mrs. Jo Walters Hynum,

In 1973, the subdivision flooded. The United States Army Corps of Engineers performed a study of the area and of floods and flood frequency. In December, 1975, the results of that study were released. The study revealed that the houses had been built at an elevation well below the 50-year flood elevation, and that the elevation as previously determined by FHA/HUD was wrong and was a 15-year flood elevation.

Petitioners filed administrative claims under the Federal Tort Claims Act which were denied. This action followed. The complaints as filed seek damages for negligence under what Dean Prosser has called "Good Samaritan" liability.

Lawrence D. Johnson, Nancy M. Johnson, Samuel L. King, Dolores Ann King, L. L. Lamb, Glenn Leggett, Helen Leggett, Charles H. Logan, Joyce A. Logan, Estates of Banks McCollough, Brenda McCollough, John Forrest Manby, Gloria L. Manby,

Jurisdiction arises under 28 U.S.C. §1346(b). Among other causes of action, complaints allege that HUD undertook to survey the subdivision for flood dangers, HUD was negligent in its survey, and HUD's negligence proximately caused plaintiffs' damage. Without the survey, plaintiffs' houses would not have been built on their present sites and the danger to which they are exposed would not have been created. The Complaints allege that HUD required the developer to make changes in the elevation of certain lots to reach the 50-year elevation, but the changes were insufficient to ensure that all lots were above the 50-year elevation. The plaintiffs, who are not

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George Henry Matthews, Betty Gibson Matthews, Robert M. Mathews, Janell Mathews, Frank Mendoza, Jr., Caroline Mendoza, John B. Miller, June E. Miller, Vallery K. Miller, Jeanne H. Miller, Odus

the original purchasers, thus need not and do not contend that they relied upon HUD's flood survey. Rather they contend that they were wholly ignorant of the flood potential of Hamilton Heights, and HUD negligently created a danger to which they were innocently exposed.

In response to these Complaints, the defendant filed a Motion to Dismiss with supporting affidavits. The motion set forth a defense under 28 U.S.C. §2680(h) which precludes recovery under the Tort Claims Act upon "[a]ny claim arising out of misrepresentation."

The District Court, the Honorable Harold Cox, found that the plaintiffs'

Guy Mobley, Carolyn Mobley, Nolan Kent Moran, Peggy C. Moran, William M. Mosier, Elka Mosier, Frankie Joe Murphy, Carolyn Murphy, Della A. Pate, Riley Presley, Kathryn Presley, Herman Ricks, Josephine Ricks, Larry L. Roberts, Letha J. Sims, William Standard, Maxine H. Standford,

complaints were timely filed, but held that the plaintiffs' claims for negligence were based "solely and alone on implied misrepresentation, or deceit in withholding this important information from these plaintiffs, and these claims therefore fit squarely within the exception provided in the Federal Tort Claims Act." Appendix A, at 9.

On appeal to the United States Court of Appeals of the Fifth Circuit, the Court then held per curiam that the fact that "the government communicated its miscalculation to the developer" meant that this action was an action for "misrepresentation" within the meaning of Federal Tort Claims Act §2680(h), even

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Raybon L. Steed, Carol B. Steed, Vic Steen, Gayle Steen, Mary Ann Stweart, Zenon Sucharski, Florence A. Sucharski, Donald H. Terrell, Mary Kathleen Terrell, Ronnie L. Terrell, Jannie L. Terrell,

though plaintiffs disclaimed any reliance upon a theory of misrepresentation. The Court, witnout discussing the common law authorities cited by petitioners, held that "to allow them to recover under a theory of 'general tort' liability for damages which stems from an indirect reliance on the same acts by the government would undermine the misrepresentation exception to the Federal Tort Claims Act". Appendix B, at 7-8.

The Court rendered its opinion on October 15, 1981, and this petition was timely filed on January 12, 1982.

Clifton L. Thornell, Jr., Carolyn Thornell, James G. Trichell, Janet Trichell, George L. Walters, Lora Imogene Walters, Robert J. Weaver, Lenora B. Weaver, Scott Weeden, Sharon Weeden, Joseph R. Whitaker, Nettie L. Wixon, Marvin E. Woods, and Reaner L. Woods.

ARGUMENT

...

THE "MISREPRESENTATION" EXCLUSION OF THE FEDERAL TORT CLAIMS ACT DOES NOT BAR A SUIT FOR NEGLIGENT CREATION OF A DANGER WHEN THE PLAINTIFF RELIES ON THE GOOD SAMARITAN TORT DOCTRINE UNDER RESTATEMENT OF TORTS 2D §§323, 324A, WHICH THE COMMON LAW DISTINGUISHES FROM MISREPRESENTATION, PARTICULARLY WHEN PLAINTIFF HAS PLEADED FACTS INCONSISTENT WITH MISREPRESENTATION.

1. United States v. Neustadt, 366 U.S. 696, 6 L.Ed.2d 614 (1961) adopted the rule that the "misrepresentation" exclusion is to be defined in terms of the common law.

In United States v. Neustadt, 366 U.S. 696, 6 L.Ed.2d 614 (1961), the Court held that negligent, as well as willful misrepresentation, was excluded by Section 2680(h). The Court went on to state that Congress intended the elements of negligent misrepresentation to be

defined according to the established tort definitions of the common law. 366 U.S., at 707. As a source for that definition, the Court relied on Restatement of Torts, Section 552, and Prosser, Torts (1941 Ed.), Chapter 16, "Misrepresentation". 366 U.S. 706 & n. 16. The Court also relied on common law definitions to identify certain tortious acts, such as giving a faulty turn signal, which were not the tort of "misrepresentation" even though they involved false communication. See 366 U.S. at 711 n. 26.

In adopting the common law definitions, the Court expressly rejected the "gist of the claim" test that had been adopted by the Fourth Circuit. The Fourth Circuit had held that when the government had made misrepresentations about its own negligent act, a Court should look to the "gist of the claim" to determine whether

the claim was based on negligence or on misrepresentation. This Court held that such an approach too easily led to circumvention of Section 2680(h). 366 U.S., at 703.

In this case, the Fifth Circuit ignored petitioners' pleading and the common law basis for their cause of action. Petitioners do not contend the United States made any representation to them about flood dangers. Rather, relying on the general tort principles of"Good Samaritan" liability, they seek to hold the United States responsible for negligently increasing a grave risk of harm to them. By searching out the facts for some evidence of a communication, and characterizing plaintiffs' claim as one resting on an "implied" misrepresentation, the Fifth Circuit has resurrected a subjective

"gist of the claim" test, and has ignored the common law standard promulgated by this Court in Neustadt.

2. Petitioners have a cause of action for common law negligence which is distinct from misrepresentation.

A. Under the common law's Good Samaritan doctrine one who negligently performs an act which, it is apparent, will create a danger to another if not done properly is liable to the other for damages attributable to that negligence.

In Mississippi, the "Good Samaritan" rule is clearly stated:

> The law imposes upon every person who undertakes the performance of an act - which, it is apparent, if not done carefully, will be dangerous to other persons, or the property of other persons - the duty to exercise his senses and intelligence to avoid injury, and he may be held accountable at law for an injury to person or property which is directly attributable to a breach of such duty.

Dr. Pepper Bottling Co. of Miss. v. Bruner, 245 Miss. 276, 148 So.2d 199,

201 (1962). Here the conduct of the United States plainly constitutes an actionable tort under this rule. The United States undertook, through an obligation imposed upon HUD by its own regulations, to determine whether or not the elevation of a subdivision was above the level of the 50-year frequency flood. That act is clearly a dangerous act. Because it was not done properly, those residing in the subdivision were innocently placed in a position of extreme peril and suffered great damage as a result.

"Good Samaritan" provisions are also found in Prosser, Torts §56, at 344 (4th ed. 1971) and in the Restatement of Torts 2d, §§323 and 324A. While Mississippi has not specifically adopted §§ 323 and 324A, the Fifth Circuit in diversity cases has repeatedly held that the courts of Mississippi would do so if presented

with the proper case. See Trosclair v. Bechtel Corp., 653 F.2d 162, 163 & n.1 (5th Cir. 1981). Section 324A provides as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

See also §323 (similiar liability to one to whom actor has undertaken to render services).

B. Good Samaritan liability is distinct from liability for misrepresentation.

i. Plaintiffs are third parties who did not rely on HUD and who could not recover for misrepresentation.

Petitioners' theory of this case is that HUD negligently increased a danger to them of which they were unaware. They base their case on Dr. Pepper and Restatement of Torts 2d §§323(a), 324A(a), 324A(b) and not on §§323(b) or 324A(c), which require that the plaintiff must have relied on the defendant.

Petitioners have wholly disclaimed any knowledge or personal reliance on the 50-year flood plain survey. Their theory of causation is that, but for the faulty survey, the government would not have granted the loans and their houses would not have been built on dangerous sites. Because petitioners do not claim

that they relied on the survey, they cannot establish a claim for misrepresentation. See Neustadt, 366 U.S., 707 n.16 (citing Restatement of Torts §522); Proser, Torts §86 (2d Ed. 1955).

Second, any representation that was made was made to the subdivision developer, not to petitioners. Petitioners are third parties and it is well established that third parties cannot recover in a suit for negligent misrepresentation. Ultramares v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931); Neustadt, 366 U.S. at 711 n. 26.

ii. The danger HUD created distinguishes this case from a suit based on misrepresentation.

Dean Prosser, in the very passage relied on by this Court in Neustadt, states:

Misrepresentation runs all though the law of torts, as a method of accomplishing various types of tortious conduct which, for reasons of historical development or as a matter of convenience, usually are grouped under categories of their own. Thus a battery may be committed by feeding the plaintiff poisoned chocolates, or by inducing his consent to a physical contact by misrepresenting its character; false imprisonment may result from a pretense of authority to make an arrest, a trespass to land from fraudulent statements inducing another to enter, or a conversion from obtaining possession of goods by false representations; and a malicious lie may give rise to a cause of action for the intentional infliction of mental suffering. A great many of the common and familiar forms of negligent conduct, resulting in invasions of tangible interests of person or property, are in their essence nothing more than misrepresentation, from a misleading signal by a driver of an automobile about to make a turn, or an assurance that a danger does not exist, to false statements or non-disclosure of a latent defect by one who is under a duty to give warning. In addition, misrepresentation may play an important part in the invasion of intangible interests, in such torts as defamation, malicious prosecution,

> or interference with contractual relations. In all such cases the particular form which the defendant's conduct has taken has become relatively unimportant, and misrepresentation has been merged to such an extent with other kinds of misconduct that neither the courts nor legal writers have found any occasion to regard it as a separate basis of liability.

Prosser, Torts, Section 86 (2d Ed. 1955). (Emphasis added).

In Neustadt, which involved the inspection of a house foundation, the Court relied on this discussion as a basis for distinguishing its prior case of Indian Towing Company v. United States, 350 U.S. 61, 100 L.Ed. 48 (1955). The Court said, at 366 U.S. 711 n. 26:

> Our conclusion neither conflicts with nor impairs the authority of Indian Towing Co. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48, which held cognizable a Torts Act claim for property damages suffered when a vessel ran aground as a result of the Coast Guard's allegedly negligent

> failure to maintain the beacon lamp in a lighthouse. Such a claim does not "arise out of * * * misrepresentation," any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. As Dean Prosser has observed, many familiar forms of negligent conduct may be said to involve an element of "misrepresentation," in the generic sense of that word, but "[s]o far misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit," and has been confined "very largely to the invasion of interests of a financial or commercial character, in the course of business dealings." Prosser, Torts, §85, "Remedies for Misrepresentation," at 702-703 (1941 ed.) (emphasis added).

In its discussion of Neustadt in reviewing the 1960 Supreme Court term, the Harvard Law Review also distinguished the Indian Towing case on the basis of the danger which the United States had created. It stated:

> In those cases in which recovery was allowed on a negligence theory although there was "an element of" misrepresentation, the plaintiff's injury arose not from reliance on information communicated to him from the government but from a danger which it was the government's obligation to control. 75 Harv.L.Rev. 218(1961) (emphasis added) (footnotes omitted).

Several courts have applied the Restatement of Torts 2d and held that when the government undertakes to inspect for a dangerous condition, it is liable for its negligence in performing the inspection notwithstanding the misrepresentation exclusion of §2068(h). See Park v. United States 517 F.Supp. 970, 978 (D.Ore. 1981); (falling rocks); Raymer v. United States, 455 F.Supp. 165, 167 (W.D. Ky. 1978)(mine safety).

3. The Fifth Circuit's decision in this case is contrary to the decisions of the Second and Sixth Circuits, and the United States concedes that Circuits are in conflict.

In Neal v. Bergland, 646 F.2d 1178, 1181-1182, (6th Cir. 1981), the Sixth Circuit, relying upon Indian Towing, held that plaintiff whose house was negligently inspected by the FHA had a cause of action under the Good Samaritan provision of the Restatement of Torts 2d §323 which was not precluded by §2068(h). The Court in Neal relied on the adoption of the Good Samaritan doctrine by the Ninth Circuit in Ingham v. Eastern Airlines, Inc., 373 F.2d 227, 236 (2nd Cir.), cert. denied 389 U.S. 931, 19 L.Ed.2d 292 (1967), and noted that its holding was in express conflict with the holding in Reynolds v. United States, 643 F.2d 707 (10th Cir. 1981), cert. denied, 50 U.S.L.W. 3245 (No. 80-2064, Oct. 5, 1981), which held that the misrepresentation exclusion precluded a suit against the United

States based upon a Good Samaritan theory. See 646 F.2d, at 1184 n. 7.

Neal and Ingham are in direct conflict with Reynolds and with the holding of the Fifth Circuit in this case. Reynolds cannot be distinguished from Neal and justified on the basis that the plaintiff in Reynolds was a third party while the plaintiff in Neal was the actual recipient of a communication. As shown above, under the common law there is even less reason to apply the misrepresentation exclusion to a third party than to the party with whom the government has had "commercial dealings". Recognizing the gravity of this conflict, the United States acknowledged in its response to the Reynolds petition:

> We therefore acknowledge the existence of a conflict between the Tenth Circuit's decision in this case and the Sixth Circuit's decision in Neal, but submit that the Sixth

> Circuit's decision is plainly inconsistent with this Court's decision in Neustadt. The government has filed a petition for rehearing en banc in the Neal case. Accordingly, there is no need at this time for the Court to resolve the conflict. There will be ample opportunity to decide this issue if the Sixth Circuit should deny the government's petition for rehearing en banc. Brief for the United States in Opposition Reynolds v. United States, No. 80-2064, at 8-9 (footnotes omitted).

The Sixth Circuit has now denied the government's petition for rehearing in Neal and these issues are ripe for review. In fact, the United States has now represented that the conflict is a "strong candidate" for review and has requested and received an extension until February 10, 1982, for time within which to file a petition seeking certiorari in Neal. See Block v. Neal, Application No. A-541 (O'Connor, J., Dec. 21, 1981).

The decision of the Fifth Circuit in this case cannot be distinguished and justified on the basis that the negligent party in this case was the Federal Housing Administration, and not the Farmers Home Administration (Neal, Park) or the FAA (Ingham) or the Secretary of Interior (Rayner). Nothing in the National Housing Act of 1934, 12 U.S.C. §§ 1701 et seq., in any way precludes the liability of the United States in this case. Indeed the legislative history of the National Housing Act of 1934, pursuant to which the 50-year flood level was established, specifically states that one of the purposes of the legislation was to provide safe housing for the public. See 12 U.S.C. §1701t; Congressional Record, Senate, May 14, 1934, p. 8739-8740 (remarks of President Franklin D. Roosevelt urging enactment of legislation); Congressional Record,

Senate, June 16, 1934, p. 12013-12015; Congressional Record, House, June 12, 1934, pp. 11179-11190 (remarks of Congressmen and Senators). Nor does United States v. Neustadt, 366 U.S. 696, 6 L.Ed.2d(1961) provide the basis for any such distinction. While that decision held that the National Housing Act did not modify the "misrepresentation" exception of the Tort Claims Act, it did not say that the National Housing Act in any way expanded the interpretation of that section. See 366 U.S. at 708. Furthermore, while the Court did cite some legislative history which indicated that Congress thought that the FHA would not liable for negligence in the statements of appraised value required to be given to homeowners by 1954 legislation, National Housing Act §226, 12 U.S.C. §1715q, see 366 U.S.,

at 709 & nn. 20-24, the Court cited no such legislative history for other sections of the Act, and, unlike Neustadt, this case does not arise under § 226 or the appraisal valuation amendments of 1954.

4. Reversal of the Fifth Circuit's decision in this case is essential to eliminate "distinctions so finespun and capricious as to be almost incapable of being held the mind."

While facts are always important in a tort case, it is no basis for denying certiorari in this case that on some point or the other it may be factually distinguishable from Neal or Ingham. No material factual distinction exists. In those cases the courts imposed Good Samaritan Tort liability upon the government, and in this case the Fifth Circuit has held that a Good Samaritan theory does not even state a claim upon which relief can be granted.

Furthermore, the failure of the ... Fifth Circuit and other courts to properly construe and apply the United States v. Neustadt has resulted in arbitrary and capricious denials of recovery under the Federal Tort Claims Act. In Neustadt, the Court specifically proclaimed its intent to eliminate such distinctions. Quoting from Indian Towing Co. v. United States, 350 U.S. 61, 68; 100 L.Ed. 48, 55, the Court said:

> There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation. 366 U.S. at 708.

By ignoring the traditional boundaries of the common law, the lower courts have expanded the misrepresentation exception into an exception that eats up the rule. See Brief for the United States in Opposition,

Reynolds v. United States, No. 80-2064, at 8 n. 6 ("Substance of the plaintiff's claim" test has been applied). The dangers of such an exception are amply illustrated by Dean Prosser, who as noted above, stated that virtually every kind of tort can be characterized as a misrepresentation if communication is in any way involved. The result is not a rule of law, but rather a return to the "gist of the action" test which the Court outlawed in Neustadt.

Because petitioners' complaint was dismissed for failure to state a claim, the facts in this case are relatively unimportant. This case presents a much better vehicle than Neal establishing the principles that should govern the misrepresentation exception of §2068(h). Two such principles are apparent here.

The first, which involves nothing more than the interpretation of Neustadt, would be for the Court to hold that the common law is the binding rule of decision and that, if a plaintiff can establish its case under a common law doctrine other than the doctrine of misrepresentation, that §2068(h) does not apply. An alternate possibility, and one that would justify summary reversal in this case, would be to hold that §2068(h) will not justify the dismissal of any pleading affirmatively inconsistent with the elements of misrepresentation.

The government has done a great wrong to petitioners. It has negligently caused housing to be built that was not safe. It has negligently certified that houses were at a 50-year flood level when in fact they were at a 15-year flood level. A private surveyor would certainly

be liable in like circumstances under common law causes of action other than misrepresentation. The Federal Tort Claims Act says that the government is to be treated "in the same manner and to the same extent as the private individual under like circumstances." 28 U.S.C. §2674. Under jurisprudence of the United States, the king can do wrong. The king has done wrong here, and should compensate those injured by the danger the king created.

PRAYER

In light of the express conflict between the decision below and the decisions of the Sixth and Second Circuits, and the conflict between the decision below and this Court's prior decisions, petitioners Baroni, et al. respectfully pray that this Court will grant this Petition for a Writ of Certiorari to the United States

Court of Appeals for the Fifth Circuit in this case and reverse the decision below.

CERTIFICATE OF SERVICE

I, LEE DAVIS THAMES, counsel for Petitioners, hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been furnished to both the Solicitor General, Department of Justice, Washington, D.C. 20530 and Ms. Thelma L. Quince, Trial Attorney, Torts Branch, Civil Division, United States Department of Justice, Washington, D.C. 20530, counsel for the defendant in this proceeding, by First Class mail with postage prepaid.

THIS, the 12th day of January, 1982.

Lee Davis Thames

LEE DAVIS THAMES

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Appendix

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

THOMAS R. BARONI AND
JON E. BARONI, ET AL PLAINTIFFS

V. CIVIL ACTION NOS.
W78-0075-W78-0135(C)

UNITED STATES OF AMERICA DEFENDANT

J U D G M E N T

These cases were consolidated by the Court on February 28, 1980 for a determination as to liability vel non of the United States for negligence as claimed. These sixty-one cases were consolidated for convenience and for the basic reason that their claims are identical.

In 1973 and again in 1975 Hatcher Bayou and Durden Creek overflowed their

banks and caused each of the plaintiffs to flee his home for safety on short notice. In 1960 the U. S. Engineers made and published a study which revealed that the plaintiffs had bought homes which were constructed in the Hamilton Heights subdivision area in Vicksburg, Mississippi above the fifty year flood elevation. Nobody by or on behalf of the United States expressly so advised the plaintiffs. The plaintiffs each relied implicitly on the Secretary of Housing and Development to ascertain whether or not the development of the subdivision had constructed plaintiffs' residence in an area above the fifty year flood frequency level, and each plaintiff relied implicitly upon that determination, and the further fact that federal money was used to finance the construction of each house on its

site in this Hamilton Heights subdivision at this time.

The plaintiffs in this case have each duly and timely filed their claims with the Government in strict accordance with the requirements of the Federal Tort Claims Act. Each of the sixty-one cases in this series of claims contend that the United States of America is liable to each of them for negligence in not revealing to them the fact that each residence was actually constructed at the time below the fifty year flood elevation, and was consequently at all times subject to flooding from Hatcher Bayou and Durden Creek. Each of these plaintiffs in suit contend that the United States examined the plans and specifications for the construction of the homes in Hamilton Heights subdivision and knew of the

importance to the plaintiffs of accurate flood information where their residences were being constructed at the time but never revealed to any plaintiff the fact that these residences were constructed below the fifty year flood elevation and were susceptible to flooding from these bodies of water in the area. The plaintiffs sustained large amounts of actual damages and have instituted suits against the United States in this instance under the Federal Tort Claims Act for the recovery thereof.

The defendant has pled its sovereign immunity from each of these suits and the defendant has interposed its motion to dismiss these sixty-one complaints for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. This Court has

conducted a full scale hearing on the question of the liability vel non of the United States for these claims under the facts and circumstances presented to the Court by their motions.

Under the Federal Tort Claims Act the United States is liable in the same manner and to the same extent as a private individual under like circumstances.[1]

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[1] 28 U.S.C.A. §2674 provides: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought,

in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983."

There was no express misrepresentation made by anyone for or on behalf of the United States as to flood conditions in the area. The Federal Tort Claims Act has certain built-in exceptions. There is expressly excepted from this waiver of sovereign immunity any misrepresentation, or deceit, express or implied, on behalf of the United States.[2]

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[2] 28 U.S.C.A. §2680 containing Exceptions provides: "The provisions of this chapter and section 1346(b) of this title shall not apply to--(h) Any Claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

The Eighth Circuit had before it six cases for the recovery of damages from

the United States for the flooding in July 1951 of the Kansas River and affirmed the judgments of the district court denying relief to the plaintiffs in each case under the Federal Tort Claims Act.[3]

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[3] National Manufacturing Company et al v. United States, (8CA) 210 F.2d 263, cert. denied 347 U.S. 967, 74 S.Ct. 778.

The Supreme Court of the United States had a Federal Tort Claims Act case before it for negligence and held that the act exceeded claims arising out of negligence as well as deliberate misrepresentation. The Court said that it was in accord with the view urged by the Government and unanimously adopted by all circuits which previously had occasion to pass upon paragraph 8 of §2680 of United States Code dealing with claims arising

out of negligence as well as willful misrepresentation. It was contended in that case that the FHA negligently misrepresented the value of the property by appraising it in excess of its worth.[4]

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[4]The Court held in United States v. Stanley S. Neustadt, 366 U.S. 696, 81 S.Ct. 1294, 1302 the Court said: "That Congress did not thereby intend to convert the FHA appraisal into a warranty of value, or otherwise to extend to the purchaser any actionable right of redress against the Government in the event of a faulty appraisal, was made irrefutably clear in the Committee Hearings in both Houses of Congress, the pertinent excerpts from which are set forth in the margin.

*** In practically all such instances, it may be said that the Government owes a 'specific duty' to obtain and communicate information carefully, less the intended recipient be misled to his financial harm. While we do not condone carelessness by government employees in gathering and promulgating such information, neither can we justifiably ignore the plain words Congress has used in limiting the scope of the Government's tort liability."

The trial court found for the plaintiffs but the Supreme Court reversed that decision of the Fourth Circuit.

This Court is of the opinion and so holds that these claims of these plaintiffs for negligence are based solely and alone on implied misrepresentation, or deceit in withholding this important information from these plaintiffs, and that these claims therefor fit squarely within the exceptions provided in the Federal Tort Claims Act itself. The United States has no implied liability to these plaintiffs under the facts and circumstances presented by this record. The United States has not in any wise or to any extent waived its sovereign immunity, and this Act certainly does not have any coverage for this flooding under the facts and circumstances stated. The motion of the United States to dismiss these cases is sustained and these sixty-one cases are hereby dismissed.

The plaintiffs under these circumstances has requested leave to file amended complaints and that request is granted on condition that such complaints be filed in this Court within fifteen days after this date.

ORDERED AND ADJUDGED, this April 29, A.D., 1980.

/s/ Harold Cox
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

THOMAS R. BARONI AND
JON E. BARONI, ET AL — PLAINTIFFS-APPELLANTS

V. — NO. 80-3427

UNITED STATES OF AMERICA — DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

(October 15, 1981)

Before CLARK, Chief Judge, GOLDBERG and WILLIAMS, Circuit Judges.

PERCURIAM:

Plaintiffs' complaint against the United States under the Federal Tort Claims Act, 28 U.S.C.A. §§1346(b), 2671,

et seq., was dismissed on the pleadings by the district court under the misrepresentation exception to that Act. 28 U.S.C.A. §2680(h). This appeal asserts that the tort basis for the action was a negligent breach of duty which did not involve misrepresentation. We affirm.

A real estate developer submitted plans for a proposed subdivision to the Federal Housing Administration (FHA), now a part of the United States Department of Housing and Urban Development. This agency approved the subdivision so that loans made on residences constructed in the subdivision would be eligible for Veterans Administration or FHA guaranteed financing. One condition of the agency's approval was that certain lots had to be filled to an elevation above the predicted 50-year flood height. This fill was

supplied, houses were constructed and financing was guaranteed. All plaintiffs are remote purchasers of subdivision houses. No representations were made by FHA or any other agencies of the government directly to any of the present plaintiffs concerning the location of the 50-year flood line or any other feature of the agency's action. The subdivision was flooded in 1973 and again in 1975, and plaintiffs' houses were damaged. A recalculation by the Army Corps of Engineers determined that the flood level location fixed by FHA was incorrect.

Claiming that they "had every reason to believe" that the elevation of the subdivision exceeded the 50-year flood line, plaintiffs asserted that the National Housing Act of 1934, 12 U.S.C.A. §1701, et seq., and FHA regulations placed a

duty on the United States to provide its citizens ... decent housing that was safe from flooding. The complaint alleged that this duty was breached by FHA's negligent failure to determine the correct flood line, failure to give warning (to persons unnamed) of the dangers resulting from the construction of the residences below the flood line, and failure to require the developer to construct the subdivision above the 50-year line elevation. The district court found that while no express representation was made to plaintiffs, §2680(h) excepted from the Tort Claims Act's waiver of sovereign immunity claims of implied misrepresentation as well as claims of direct misrepresentation which were covered by United States v. Neustadt, 366 U.S. 696, 81 S.Ct. 1294, 6 L.Ed.2d 614 (1961).[1]

[1] In Rey v. United States, 484 F.2d 45 (5th Cir. 1973), we found that a plaintiff, who had given his livestock a dangerous vaccination in reliance on the government's statement that the livestock was infected with Cholera, was barred under Neustadt from recovering his damages from the government. However, when the government itself destroyed livestock because of its negligent determination that the livestock was diseased, we found that because the damages arose out of the government's negligent diagnosis rather than any negligent misrepresentation, Neustadt did not bar the plaintiff's suit. See Ware v. United States, 626 F.2d 1278, 1283 (5th Cir. 1980).

On this appeal plaintiffs contend that the district court erroneously construed the action they sought to assert. They assert it did not involve the tort of misrepresentation and point out that the alleged negligent action of the FHA could not have been communicated to any plaintiff in this action. The

difficulty with this position is that if the tort of misrepresentation is not involved, then plaintiffs assert no cause of action against the United States in tort.

The plaintiffs attempt to claim that the government committed a "general tort" when it miscalculated the flood level. They contend that the United States owed them a duty either because, under state law. it undertook to establish the flood level or because, under federal law, the National Housing Act imposed a duty on it to provide safe housing.

United States v. Neustadt, 366 U.S. 696 (1961), however, makes clear that no federal duty was created by the National Housing act. While the information supplied by the government may "inure, incidentally, to the benefit of

prospective home purchasers," the primary purpose of the government's undertaking is to make sure that homes receiving FHA mortgages are constructed to standards warranting mortgage guarantee protection. See id. at 708. As the Court stated, Congress did not intend "to extend to the purchaser any actionable right of redress against the Government in the event of a faulty appraisal . . . ." Id. at 709.

Assuming that the government's undertaking created a duty under state law to determine the flood level non-negligently, the damages complained of by the plaintiffs still result solely from the fact that the government communicated its miscalculation to the developer who relied on it, and that reliance eventually caused the plaintiffs' damage. As noted above, the plaintiffs are prevented from

recovering for these damages under a theory of misrepresentation either because of the misrepresentation exception to the Federal Tort Claims Act in §2680(h) or because of the fact that a party who has been damaged by, but who has not relied directly on the misrepresentation, does not have a cause of action for misrepresentation. To find that the plaintiffs would be barred from recovering their damages under a direct theory of misrepresentation but to allow them to recover under a theory of "general tort" liability for damages which stem from an indirect reliance on the same acts by the government would undermine the misrepresentation exception to the Federal Tort Claims Act.

AFFIRMED.

Opposition

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No. 81-1326

In the Supreme Court of the United States

OCTOBER TERM, 1981

THOMAS R. BARONI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a suit alleging negligence by the Department of Housing and Urban Development in approving subdivision development plans that included lots mistakenly placed below the 50-year flood elevation level by the developer in reliance on misinformation supplied by the government is barred by the "misrepresentation" exception to suits allowed against the United States under the Federal Tort Claims Act, 28 U.S.C. 2680(h).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-8) is reported at 662 F. 2d 287. The opinion of the district court (Pet. App. A1-10) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1981. The petition for a writ of certiorari was filed on January 12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under Section 203 of the National Housing Act of 1934, 12 U.S.C. 1709, the Department of Housing and Urban Development (HUD) is authorized to offer mortgage insurance on houses meeting certain eligibility qualifications that are provided for generally by statute and regulation. See also 24 C.F.R. Part 203. Responsibility for

making these eligibility determinations has been delegated to the Commissioner of the Federal Housing Administration (FHA), which is an organizational unit within HUD. 24 C.F.R. 200.2, 200.5.

During 1960 or 1961, James C. Hamilton, Jr., a real estate developer, requested FHA to approve subdivision plans for a development in Vicksburg, Mississippi, to be called the Hamilton Heights Subdivision (R. 57-58).[1] Hamilton requested the analysis on each of the four proposed stages of the development project, so that houses constructed there would be eligible for FHA mortgage insurance under Section 203 of the Act (R. 58, 125-126).

FHA guidelines in effect at the time Hamilton applied for a subdivision analysis allowed the FHA to approve an application only if the minimum elevation of the property in question would be such that it would not be affected by floods of a 50-year frequency (R. 59, 69). Pursuant to this requirement, Hamilton filled certain lots to an elevation specified by FHA to be above the 50-year flood height for the area (Pet. App. B2-3). FHA subsequently guaranteed financing for houses in the project (*ibid.*).

The houses thus constructed subsequently were purchased by petitioners, but there were no direct representations to them either by the FHA or by the developer concerning the location of the 50-year flood line (Pet. App. B3). In 1973 and 1975, the subdivision flooded, and petitioners' homes were damaged (*ibid.*). A subsequent study by the Army Corps of Engineers revealed that the flood level determination made by the FHA was incorrect (*ibid.*).

2. After exhausting their administrative remedies (R. 83-84), petitioners filed suits against the United States in the

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[1] "R." refers to the record in the court of appeals.

United States District Court for the Southern District of Mississippi under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*[2] Petitioners asserted that the National Housing Act of 1934 and the FHA's regulations created a duty on the part of the United States to provide its citizens with decent housing that was safe from flooding (R. 3) and that this duty had been breached by FHA's negligent failure to determine the correct flood line for their subdivision (R. 3-4).

The district court dismissed the complaint, finding that it was barred by the "misrepresentation" exception to the Federal Tort Claims Act, 28 U.S.C. 2680(h), as interpreted in this Court's decision in *United States* v. *Neustadt*, 366 U.S. 696 (1961). The district court found that no direct representation was made to petitioners, but nonetheless concluded that Section 2680(h) covered claims of implied misrepresentation as well as express misrepresentation (Pet. App. A6).

The court of appeals affirmed (Pet. App. B1-8). It rejected petitioners' contentions that their claims were based upon a "general tort" committed by the United States for negligently determining the proper flood level. The court of appeals held that petitioners' complaints either alleged a claim for "misrepresentation," for which recovery is precluded under Section 2680(h), or failed to state a cause of action in tort, because petitioners could show no reliance on the government's alleged negligence (Pet. App. B8).

ARGUMENT

The decision of the court of appeals is a correct application of the Federal Tort Claims Act's "misrepresentation" exception as interpreted in *United States* v. *Neustadt*, 366

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[2]Sixty-one separate complaints were filed on behalf of petitioners, on or about November 30, 1978. By order dated February 28, 1980, the cases were consolidated for purposes of determining liability (R. 52-55).

U.S. 696 (1961). However, the United States has filed a petition for a writ of certiorari in *Block* v. *Neal*, No. 81-1494 (filed Feb. 9, 1982), which directly raises the issue of the proper interpretation of Section 2680(h). The Court therefore may wish to hold this petition pending its disposition of our petition in *Neal*.[3]

1. In *Neustadt*, an FHA inspector failed to discover cracks in the foundation of a house that was financed by the FHA. Plaintiffs alleged and the court of appeals held that the FHA breached a "duty to use due care in obtaining and communicating information upon which [another] party may reasonably be expected to rely." 366 U.S. at 706. This Court held that the plaintiffs had alleged only "the traditional and commonly understood * * * tort of 'negligent misrepresentation' " and therefore disallowed their claims. *Ibid.* The Court also rejected the argument that the FHA owed a duty to protect the mortgagor based on the statutory requirement of making an inspection and offering an appraisal. *Id.* at 708. It concluded that those requirements were for the benefit of the government, not the purchaser. *Id.* at 708-709.

Petitioners argue that this case differs from *Neustadt* in two respects. First, they contend (Pet. 9-13) that, unlike Neustadt, this case involves the duty to use due care in determining whether the subdivision was above the 50-year flood level.[4] *Neustadt* held (366 U.S. at 706), however, that if, as here, the essence of a claim is that the government acted unreasonably in obtaining and communicating information, then attempting to characterize the issue as one of

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[3]We have sent petitioner a copy of our petition in *Neal*.

[4]Petitioners plainly misread this Court's decision in *Neustadt* when they contend (Pet. 9) that it precludes courts from examining a claim carefully to determine its real basis. In fact, *Neustadt* clearly requires courts to ascertain whether the "gist of the claim" is misrepresentation, rather than some prior act of actionable negligence. 366 U.S. at 703.

negligence underlying the inaccurate representation represents "nothing more than an attempt to circumvent § 2680(h) * * *." *Id.* at 703. That petitioners' claims in fact arise out of misrepresentation is clear; even if the FHA had accurately ascertained the 50-year flood elevation for the lots in question, petitioners would still have been injured unless that information was made available to the developer. Thus, the basis for petitioners' claims ultimately must rest on the FHA's conveyance of erroneous information to the developer and his reliance thereon, and therefore the claims are barred by Section 2680(h).[5]

Petitioners err in relying (Pet. 17-18) on *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), in an attempt to avoid this result. In *Indian Towing*, the Coast Guard was held liable for gratuitously operating a lighthouse beacon and negligently allowing it to cease functioning. The Court in *Neustadt* distinguished *Indian Towing* on the ground that the activity that caused the injury could not fairly be characterized as a "misrepresentation." See *United States* v. *Neustadt, supra*, 366 U.S. at 711 n.26. Here, however, as shown above, the essence of petitioners' claim is negligent misrepresentation resulting from the FHA's failure to determine and accurately convey to the developer the correct flood level elevation. The failure to determine the proper flood line, by itself, could cause no injury.

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[5]Petitioners also contend (Pet. 25) that because this case does not involve an FHA appraisal pursuant to Section 226 of the National Housing Act of 1934, 12 U.S.C. 1715q, this Court's careful analysis of the Act's legislative history in *Neustadt* is inapposite. That argument, however, fails to take into account that the Court's inquiry in *Neustadt* was not limited to Section 226, but included the mortgage insurance program that is involved here. It was with respect to the entire program that the Court observed that it was "not designed to insure anything other than the repayment of loans made by lender-mortgagees" and that " 'there is no legal relationship between the FHA and the individual mortgagor.' " 366 U.S. at 709 quoting H.R. Conf. Rep. No. 2271, 83d Cong., 2d Sess. 66 (1954).

Petitioners also are mistaken in arguing (Pet. 14-15) that because the FHA's representations concerning the flood level elevation were made to the subdivision developer and petitioners therefore did not rely on any statements, the complaints cannot state a claim for misrepresentation.[6] As the court of appeals correctly recognized (Pet. App. B5-6), if petitioners have no claim for misrepresentation, they have no cause of action at all against the United States.[7]

2. Relying primarily on the decision of the Sixth Circuit in *Neal* v. *Bergland*, 646 F. 2d 1178 (1981), petition for cert. pending, No. 81-1494 (filed Feb. 9, 1982), petitioners contend (Pet. 19-25) that there is a conflict among the courts of appeals on the proper interpretation of Section 2680(h). *Neal* involves the applicability of the misrepresentation exception to a suit by a mortgagor alleging negligence by the Farmers Home Administration (FmHA) in supervising and inspecting the construction of a house. Because the

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[6]This suggestion is, in any event, not necessarily accurate. A number of courts have recognized that a cause of action for misrepresentation may be stated by such "third parties" where the defendant is aware that his representation will be passed on to some limited group "whose reliance on the [information] was something more than foreseeable but something less than identifiably known." *Rozny* v. *Marnul*, 43 Ill. 2d 54, 67, 250 N.E.2d 656, 663 (1969). See *Restatement (Second) of Torts* § 552 (1977); W. Prosser, *Torts* § 107, at 708-709 (4th ed. 1971).

[7]Petitioners assert (Pet. 19) that the tort involved here arises from the United States' negligence in "inspect[ing] for a dangerous condition" and that two district courts have recognized the existence of such a cause of action despite Section 2680(h). *Park* v. *United States*, 517 F. Supp. 970 (D. Ore. 1981), however, is currently on appeal before the Ninth Circuit (No. 81-3524 (appeal docketed Dec. 11, 1981)) on the ground that the district court erred in failing to find plaintiffs' claims barred by Section 2680(h) as interpreted in *Neustadt*. And in *Raymer* v. *United States*, 660 F. 2d 1136 (6th Cir. 1981), petition for cert. pending, No. 81-1409 (filed Jan. 27, 1982), the Sixth Circuit reversed the district court decision relied on by petitioners, holding that no action would lie against the United States under the Federal Tort Claims Act for the alleged negligence of Bureau of Mines inspectors.

plaintiff's claim in *Neal* arose out of the FmHA's activities in administering the rural housing assistance provisions of the National Housing Act of 1949, 42 U.S.C. (Supp. III) 1471 *et seq.*, the issue presented by that case is not identical to the question involved here.[8] Nevertheless, the general issue posed in the two cases is the same and a decision by this Court in *Neal* would have a direct bearing on the outcome of this case. Because in our view the decision of the court of appeals in *Neal* is directly contrary to this Court's holding in *United States* v. *Neustadt, supra*, we have urged the Court to reverse *Neal* summarily. The Court therefore may wish to defer consideration of the petition in this case until it has acted on the government's petition for certiorari in *Neal*. If certiorari is granted in *Neal*, the petition here should be disposed of as appropriate in light of the decision in that case.

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[8]The decision below does not conflict with the decision in *Ingham* v. *Eastern Air Lines, Inc.*, 373 F. 2d 227 (2d Cir.), cert. denied, 389 U.S. 931 (1967), which involved the applicability of the misrepresentation exception to a suit alleging negligence by the Federal Aviation Administration in failing to observe its regulations requiring the agency to advise incoming aircraft of changes in weather conditions. There, the court found that "the gravamen of the complaint [was] the negligent performance of operational tasks, rather than misrepresentation * * *." *Id.* at 239.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the government's petition in *Block* v. *Neal*, No. 81-1494.

Respectfully submitted.

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Petitioner's Reply Brief

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NO. 81-1326

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1981

THOMAS R. BARONI, ET AL. PETITIONERS

v.

UNITED STATES RESPONDENT

ON WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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2. This Court should grant certiorari in Baroni, and hold Block v. Neal, No. 87-1494, and Raymer v. United States, 600 F.2d 1136 (6th Cir. 1981), petition for certiorari pending, No. 81-1409. 4

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ARGUMENT

1. The Circuits are in conflict on the fundamental question:

> Does the "misrepresentation" exclusion of the Federal Tort Claims Act mandate dismissal of a suit for the general tort of negligent creation of a danger by breach of duty voluntarily assumed? Restatement of Torts Second §§323, 324(a).

The issue in this case is whether the "misrepresentation" exclusion of the Federal Tort Claims Act mandates dismissal of a suit for the general tort of negligent creation of a danger by breach of the duty voluntarily assumed. That duty arises under the common-law's "Good Samaritan" doctrine and is codified in the Restatement of Torts Second §§323, 324(a). Both the Sixth Circuit, in Neal v. Bergland, 646 F.2d 1178, 1181-1182 (6th Cir. 1981), petition for certiorari pending, No. 87-1494; and the Second

Circuit, Ingham v. Eastern Airlines, Inc., 373 F.2d 227, 236 (2nd Cir. 1967) have held that the "misrepresentation" exclusion does not bar such a suit.

The Fifth Circuit in this case held to the contrary, as did the Tenth Circuit in Reynolds v. United States, 643 F.2d 707 (10th Cir. 1981). The United States concedes that these cases conflict with Neal. The United States suggests that these cases do not conflict with Ingham, Brief for the United States in Opposition, at 7 n. 8, because Ingham applied a "gravamen of the complaint" test. The United States wholly fails to discuss, however, Ingham's reliance on the Good Samaritan Doctrine as its basis for finding that the complaint had a common-law basis other than misrepresentation. 373 F.2d at 236, 239.

Moreover, it is plain that the Ingham case is in conflict with the construction of the Federal Tort Claims Act now urged by the United States. The United States contends that the misrepresentation exclusion applies whenever "the essence of a claim is that the government acted unreasonably in obtaining and communicating information." Brief for the United States at 4. If that is the test, then the Second Circuit was clearly in error in holding that the Federal Aviation Administration could be sued for negligence "in failing to observe its regulations requiring the agency to advise incoming aircraft of changes in weather conditions." Id at 7 n. 8.

This Court should grant certiorari and enforce the rule adopted in United States v. Neustadt, 366 U.S. 696, 6 L.Ed.2d 614 (1961), and hold that

common-law causes of action other than misrepresentation are not barred by the misrepresentation exclusion. A ruling from this Court is necessary to end the arbitrary and capricious "gist of the complaint" test which this court attempted to bury in Neustadt but which the United States is vigorously attempting to resurrect.

2. This Court should grant certiorari in Baroni, and hold Block v. Neal, No. 87-1494, and Raymer v. United States, 600 F.2d 1136 (6th Cir. 1981), petition for certiorari pending, No. 81-1409.

The Solicitor General suggests that the petition in Baroni be held pending the disposition of Block v. Neal. Adjudication by this Court of Block v. Neal, however, would not resolve the fundamental issue present in these cases. The principal distinctions upon which the Baroni petitioners rely to distinguish

their cause of action from one arising out of misrepresentation are not present in Block v. Neal. In Baroni, the government negligently created a dangerous condition which caused the Baroni plaintiffs harm, even though they did not rely on any representation by the government.* In Block v. Neal, on the other hand, the government merely failed to make a proper inspection of a condition

---

*The United States is incorrect in asserting that the Baroni petitioners' claims "in fact" arise out of misrepresentation. If the United States had told the developer the location was a 15-year flood location and nevertheless provided the financing for building houses in that dangerous location, contrary to its regulations, the Baroni petitioners could still sue the United States under Restatement §324A. That here the United States also made a misrepresentation to the developer, not relied on by the plaintiffs, is irrelevant to their cause of action.

which was not inherently dangerous, and the government communicated its inspection report to the plaintiff who relied upon it. In Baroni, the United States actually assumed the duty of telling the subdivision developer where to build his houses and how high he had to fill the lots. In Block v. Neal, all the government did was perform an inspection. Also, in its Petition for Writ of Certiorari in Block v. Neal, the United States relies in part upon an asserted Congressional intent to preclude tort actions by creating an administrative remedy for structural housing defects. No such intent or remedy is present in the Baroni case. The Solicitor General's claim that the preclusive intent expressed in the legislative history cited in Neustadt

applies outside the context of §226 of the Fair Housing Act is belied by the Neustadt opinion itself, 366 U.S., at 709-710 & n. 24. The 1954 amendments to the Act, which became section 226, have nothing to do with the Baronis' claim.

Similarly, Raymer v. United States does not squarely present the fundamental issue. In Raymer the Sixth Circuit held that the mine safety inspector's negligence had not "increase[d] the risk of harm" and so the plaintiff had failed to establish a claim under Restatement §324(A). 600 F.2d, at 1143. Here the actions of the United States in causing houses to be built on a 15 year flood plain did increase the risk of danger to the plaintiffs, and they have a cause of action under §324(A) which is not barred by the misrepresentation exclusion.

This case thus presents the best vehicle for review of the fundamental question which must be faced by this Court. This Court should grant review and hold that the misrepresentation exclusion of the Federal Tort Claims Act does not mandate dismissal of a suit for the general tort of negligent creation of danger by breach of duty voluntarily assumed, particularly when the plaintiff does not claim reliance upon a misrepresentation.

PRAYER

Petitioners respectfully pray that this Court will grant their petition for a writ of certiorari and reverse the decision of the Fifth Circuit below.

Respectfully submitted,

THOMAS A. BARONI, ET AL.

BY: Lee Davis Thames by cm
LEE DAVIS THAMES

CERTIFICATE

I, LEE DAVIS THAMES, counsel for petitioners, hereby certify that three copies of the foregoing Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been furnished to both the Solicitor General, Department of Justice, Washington, D.C. 20530 and Ms. Thelma L. Quince, Trial Attorney, Torts Branch, Civil Division, United States Department of Justice, Washington, D.C. 20530, Counsel for the Defendant in this proceeding, by First Class Mail with postage prepaid.

THIS, the 10th day of March, 1982.

Lee Davis Thames by LTM
LEE DAVIS THAMES

Supplemental Petitioner's Brief

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No. 81-1326

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1982

THOMAS R. BARONI, ET AL. PETITIONERS

V.

UNITED STATES RESPONDENT

ON WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

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ARGUMENT

1. Consistency with Block v. Neal, No. 81-1494, requires the granting of this Petition, reversal of the Fifth Circuit, and remand to the District Court for further proceedings.

The District Court dismissed Petitioners' Complaints under the Federal Tort Claims Act against the United States on the ground that this case fell within the misrepresentation exception to that Act, 28 U.S.C. § 2680(h).

The Fifth Circuit affirmed the District Court's judgment. The Fifth Circuit said that these Complaints allege that the FHA negligently failed "to determine the current flood line" and negligently failed "to require the developer to construct the subdivision

above the 50-year line elevation." The Fifth Circuit agreed that § 2680(h) barred this action even though the Government made no express representation to Petitioners. 662 F.2d, at 288; Pet. App. B, p. 4. It stated:

> Assuming that the government's undertaking created a duty under state law to determine the flood level non-negligently, the damages complained of by the plaintiff still result solely from the fact that the government communicated its miscalculation to the developer who relied on it, and that reliance eventually caused the plaintiffs' damage. . . . To find that the plaintiffs would be barred from recovering their damages under a direct theory of misrepresentation but to allow them to recover under theory of "general tort" liability for damages which stem from an indirect reliance on the same acts by the government would undermine the misrepresentation exception to the Federal Tort Claims Act

662 F.2d, at 289; Pet. App. B, pp. 7-9. (Emphasis added).

In Neal, this Court has rejected the reasoning upon which the lower courts have relied. This Court held in Neal that the misrepresentation exception does not bar suits under tort theories other than misrepresentation. The Court held a cause of action under Restatement of Torts 2d § 323 for negligent creation of a danger is not barred by § 2680(h). It said:

> [Section 2680(h)] does not bar negligence actions which focus not on the Government's failure to use due care in communicating information, but rather on the Government's breach of a different duty.
>
> In this case, unlike [United States v. Neustadt, 366 U.S. 696, 6 L.Ped.2d 614 (1961)] the Government's misstatements are not essential to plaintiff's

negligence claim. The Court of Appeals found that to prevail under the Good Samaritan doctrine, Neal must show that FmHA officials voluntarily undertook to supervise construction of her house; that the officials failed to use due care in carrying out their supervisory activity; and that she suffered some pecuniary injury proximately caused by FmHA's failure to use due care. FmHA's duty to use due care to ensure that the builder adhere to previously approved plans and cure all defects before completing construction is distinct from any duty to use due care in communicating information to respondent. . . . Neal's factual allegations would be consistent with proof at trial that Home Marketing would never have turned the house over to Neal in its defective condition if FmHA officials had pointed out defects to the builder while construction was still underway, rejected defective materials and workmanship, or withheld final payment until the builder corrected all defects.

* * *

> Common to both the misrepresentation and the negligence claim would be certain factual and legal questions, such as whether FmHA officials used due care in inspecting Neal's home while it was under construction. But the partial overlap between these two tort actions does not support the conclusion that if one is excepted under the Tort Claims Act, the other must be as well. Neither the language nor history of the Act suggest that when one aspect of the Government's conduct is not actionable under the "misrepresentation" exception, a claimant is barred from pursuing a distinct claim arising out of other aspects of the Government's conduct. No. 81-1494, Slip. Op. at 8-9 (footnotes omitted) (emphasis added).

This Court's decision in Neal requires that this Petition be granted, the judgment of the Fifth Circuit reversed, and the case remanded for further proceedings. Petitioners'

Complaint that the FHA negligently failed to determine the correct flood line and to require the developer to construct the subdivision above the 50-year line elevation clearly states a claim that Government officials "voluntarily undertook to supervise construction" of the subdivision, that they "failed to use due care in carrying out their supervisory activity" and that petitioners have "suffered some pecuniary injury proximately caused" by the Government's failure to use due care. The Complaints state a claim for "Good Samaritan" tort liability which is independent of a claim for negligent misrepresentation and "the partial overlap between these two tort actions"

does not prevent Petitioners' claims from going to trial.

Summary reversal in light of the Block decision would expedite this litigation, which involves injuries which are already ten years old in some cases. Because Petitioners' Complaints were dismissed for failure to state a claim, there is no need for further consideration by the Fifth Circuit of the facts of the case.

Nor is there any basis under this Court's opinion in Neal to distinguish actions involving the National Housing Act of 1934, as amended, 12 U.S.C. § 1709, from those involving the Housing Act of 1949, 42 U.S.C. § 1471, et seq. The Court's opinion states that statutory claims were not considered. See No. 81-1494, Slip. Op., at 6, n. 4.

2. In the alternative, the Court should grant this Petition, vacate the judgment below and remand for reconsideration by the Fifth Circuit

Petitioners pray that, in the alternative, the Court will grant their Petition, vacate the judgment below, and remand for further consideration by the Fifth Circuit. The Government's Brief in Opposition to this Petition states:

> The general issue posed in [Neal and Baroni] is the same and a decision by this Court in Neal would have a direct bearing on the outcome of this case. . . . If certiorari is granted in Neal the petition here should be disposed as appropriate in light of the decision in that case. Brief for the United States, p. 7.

In light of this concession, reconsideration by the Court of Appeals would be in order if this Court is

reluctant to reverse that Court summarily.

CONCLUSION

Petitioners respectfully pray that this Court will grant their petition or a writ of certiorari, reverse the decision of the Fifth Circuit below, and instruct that Court to remand to the district court for further proceedings.

In the alternative, petitioners pray that this Court will vacate the mandate of the Fifth Circuit and remand for further consideration of this case by that Court.

Respectfully submitted,

THOMAS A. BARONI, ET AL

BY: Lee Davis Thames
LEE DAVIS THAMES

CERTIFICATE

I, LEE DAVIS THAMES, counsel for petitioners, hereby certify that three copies of the foregoing Supplemental Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been furnished to both the Solicitor General, Department of Justice, Washington, D.C. 20530 and Ms. Thelma L. Quince, Trial Attorney, Torts Branch, Civil Division, United States Department of Justice, Washington, D.C. 20530, Counsel for the Defendant in this proceeding, by First Class Mail with postage prepaid.

THIS, the 10th day of March, 1983.

Lee Davis Thames

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